

IN THE INDUSTRIAL TRIBUNAL FOR GIBRALTAR

Ind Tri 4/2005

BETWEEN:

DAVID BONNICI

Complainant

- and -

**CASSAVA ENTERPRISES
(GIBRALTAR) LIMITED**

Respondent

RULING

Mr. J.J. Bossano for the Complainant

Ms. Gillian Guzman for the Respondent

1. BACKGROUND

- 1.1. On the 3rd March 2005, the Complainant filed an Originating Application for Unfair Dismissal and the Respondent entered a Notice of Appearance on the 21st March 2005.
- 1.2. I was appointed Chairman by letter dated the 23rd June 2005 pursuant to Rule 7 (2) of the Industrial Tribunal Rules for the purposes of hearing the Complainant's application for unfair dismissal.
- 1.3. On the 24th November 2005, I made an Order for Directions for Trial including that a preliminary hearing of the Complainant's application to have the identity of those persons who made allegations against him disclosed and for witness orders to be made in respect of those persons to take place on the

7th April 2006. At the request of the Respondent's solicitors, and with the consent of the Complainant, that hearing date was vacated and re-scheduled to the 16th May 2006. Having reserved my ruling on the preliminary issue, the parties were notified by letter dated the 19th May 2006 that the 3rd October 2006 to the 6th October 2006 had been set aside for the substantive hearing of the Complainant's claim for unfair dismissal. On the 1st September 2006, I gave a ruling on the preliminary issue.

- 1.4. On the 8th September 2006 the Secretary of the Industrial Tribunal was notified that the Complainant's representative would be unable to attend the substantive hearing because he would be attending a meeting of the UN Committee of Twenty-Four on the 4th October 2006 and would be away from Gibraltar from the 3rd October 2006 to the 5th October 2006 inclusive and requesting that the hearing be re-scheduled. The Secretary of the Tribunal liaised with the parties as to their availability for the substantive hearing and on this being established notified the parties by letter dated the 7th December 2006 that the next substantive hearing dates had been scheduled and set down for the 30th January 2007 to the 1st February 2007 inclusive.
- 1.5. Shortly after that letter was sent out by the Secretary of the Industrial Tribunal, the Complainant's representative objected to my continuing as Chairman in this matter by letter dated the 15th December 2006 on the grounds that I was acting for the Attorney-General in three other cases involving claims for unfair dismissal where the Complainant's representative was assisting other Complainants and he felt that there was a conflict of interest in me continuing as Chairman in this case.
- 1.6. The parties were then requested to submit legal submissions as to why I should not continue acting as Chairman. The Respondent's representatives replied by letter dated the 17th January 2007 stating that the Respondent had consented to the application being made at this stage in the expectation that by addressing the issues of capacity at an early stage it would reduce the likelihood of an

appeal against the Tribunal's decision on the substantive issues should the Claimant be unsuccessful. The Respondent's representatives had not seen the letter dated the 15th December 2006 addressed by the Complainant's representative to the Tribunal and it was not the Respondent's intention in agreeing to this that the application would be made jointly. The Respondent had no arguments to make concerning my capacity to continue acting as Chairman.

- 1.7. The Complainant's representative informed the Secretary of the Tribunal by telephone that he would not be making written legal submissions and would present his arguments for this at the hearing.
- 1.8. On attending at the hearing on the 30th January 2007, neither parties representative appeared and the Secretary of the Tribunal was asked to ascertain the reasons for that non-attendance. The Complainant's representative's explanation by letter dated the 2nd February 2007 was that he had not been notified of the hearing date on the 30th January 2007 and that the fax machine was not working properly. The Respondent's representative's explanation was that he was faced with an unexpected domestic emergency.
- 1.9. The Secretary of the Tribunal was asked to set down another date for this hearing and informed both parties representatives on or about the 27th March 2007 that the preliminary hearing as to my capacity to hear this matter had been set down for hearing at 10 a.m. on the 26th April 2007. On the morning of the hearing, the Secretary of the Tribunal received a call from Mr. Bossano that he was unable to attend the hearing because he had the flu.
- 1.10. By letter dated the 15th October 2007 the Secretary set the matter down for re-hearing on the 20th November 2007 but which I was unable to attend and the matter was re-scheduled for hearing on the 12th March 2008.

2. THE COMPLAINANT'S SUBMISSIONS

2.1. The Complainant's grounds of objection to me continuing to act as Chairman are that:-

2.1.1. As I have accepted a number of briefs for employers in employment claims, relating primarily to Government, authorities of a public nature or companies which are wholly owned by Government, I am employer inclined and would be unable to consider this claim by an employee for unfair dismissal fairly.

2.1.2. Arguments that I am said to have put forward as Counsel in other cases, without specifying what those are, are considered unsustainable and therefore the Complainant's representative has no confidence I will be able to deliberate properly when hearing this claim for unfair dismissal.

2.1.3. The Complainant's representative has a lack of confidence in my ability to deal with the issues of the fairness or otherwise in this matter fairly.

2.1.4. That the Complainant is now an employee of a client of mine.

2.2. There is no suggestion:-

2.2.1. Of actual bias on my part, and nor is there any suggestion of me having any pecuniary, financial, proprietary or other interests in the outcome of the case. Accordingly, there is no suggestion of actual bias or automatic disqualification.

2.2.2. That I might have displayed any outward hostility or bias to the Complainant's representative when appearing against him on other matters as Counsel for a respondent employer, or during the conduct of this case.

2.2.3. That I have made any adverse remarks as Chairman or otherwise conducted myself to indicate that I have closed my mind to any issues which call for my decision so as to give the appearance or impression of bias.

3. THE RESPONDENT'S SUBMISSIONS

The Respondent's position is that as there is no connection between the Respondent and myself, and I do not have any interest in the outcome of the case, the Respondent could not see what conflict arose from my continuing to act as Chairman.

4. THE LAW

4.1. Actual or conscious bias is not being suggested in this case.

4.2. Nor is it being suggested that as a practising member of the Gibraltar Bar I should not act as a Chairman. Otherwise, every case in which Counsel sits as Chairman would be open to criticism and by natural extension where Counsel currently practises in employment matters and sits as Chairman.

4.3. In the absence of actual or conscious bias being suggested, the test is whether there is a real danger of bias in terms of real possibility rather than probability of bias. Justice must not only be done but also seen to be done in accordance with the Judge's duty. Is there a possibility of unconscious bias?

4.4. The onus is on the applicant to satisfy me of this, and it would be wrong to yield to a tenuous or frivolous objection as it would be for me to ignore an objection of substance. In **Locabail (UK) Limited v. Bayfield Properties Limited (2000) 1 ALL ER CA** reference was made to comments made in the High Court of Australia in the Case of *Re JRL ex parte CLJ* (1986) 161 CLR 342:-

"Although it is important that justice must be seen to be done, it is equally important that the judicial officers discharge their duty to sit, and do not, by

acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking a disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour”.

4.5. Taking into account these facts, the Complainant has not discharged the onus on him for the following reasons:-

4.5.1. Everything depends on the facts and circumstances of each case, which can of course include the nature of the issues to be decided;

4.5.2. I am not connected, directly or indirectly, to the parties before me.

4.5.3. I do not consider the cases in which I am involved as Counsel for employers as the same as this case. Whilst the claims involved claims for unfair dismissal, the similarities are what one would expect in claims for unfair dismissal, there is nothing specific or peculiar which can be stated to be such a similarity that it would be hard for me to discharge my duty of impartiality when hearing this matter because of an argument I advanced as Counsel in another matter. Any possible similarities between issues in other cases where I appear as Counsel, and this case, were not identified by the Complainant's representative, and I do not consider them to be other than normal and usual in any claim for unfair dismissal.

4.5.4. There is no suggestion that I have closed my mind to any of the issues to be decided in this case by my conduct or otherwise.

4.5.5. I have in my career acted for many employees in Gibraltar, including employees with claims against Government and the Ministry of Defence, and acted on behalf of union members on the instructions of several unions. As the Complainant's representative (to my knowledge) only takes on claims on

behalf of employees, he has only come across me as Counsel acting for employers.

4.5.6. As my fellow Chairman, Mr. Stephen Bossino, stated in *Manual Perez Garcia v. A.M. Scaffolding and Cradles Limited* (Case No. 6/2003), Counsel in private practise predominant in the employment field regularly sit as Chairman. I do not see any conflict arising from my continuing as Chairman of this case. This is the first objection I have had to me acting as Chairman. The fact that I now find myself as Counsel and as a representative of employers with Mr. Bossano acting as the representative of various employees, is not sufficient in my view for an appearance of bias. I therefore dismiss the application.

Dated this 30th day of May 2008

**Mark Isola
Chairman**

